

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRA BOWERS and U.S. POSTAL SERVICE,
AIRPORT MAIL FACILITY, Miami, FL

*Docket No. 99-2361; Submitted on the Record;
Issued August 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a recurrence of his medical condition on or about October 5, 1997 that was causally related to the work injury of November 7, 1974; and (2) whether the Office of Workers' Compensation Programs properly terminated compensation benefits on the grounds that appellant no longer had residuals of the November 7, 1974 injury.

On November 7, 1974 appellant, then a 28-year-old mailhandler, injured his low back while lifting and throwing heavy sacks of mail. The Office accepted his claim for low back strain and herniated disc at L4-5. Appellant received compensation on the periodic rolls. He sustained recurrences of disability on June 17, 1982 and September 5, 1984. He returned to work eight hours a day in a limited-duty capacity on July 30, 1991.

On October 27, 1997 appellant filed a claim asserting that he sustained a recurrence of his medical condition on or about October 5, 1997. He missed two days of work and returned to his limited-duty job. He seeks reimbursement of medical bills.

In a report dated December 16, 1997, Dr. Robert S. Ennis, a Board-certified orthopedic surgeon and appellant's attending physician, noted that appellant was unable to return to work following his 1974 employment injury until 1982, when he returned to limited duty. He explained that appellant had since continued to complain of chronic, intermittent low back pain and radiculitis. Dr. Ennis noted that appellant had also had several additional back injuries during the succeeding years involving motor vehicle accidents. "As far as I can tell," he reported, "following each one of these incidents he has improved to the point of his previous level of activity but has continued to have chronic pain since that time."

Dr. Ennis reported that a magnetic resonance imaging scan of the lumbar spine obtained in May 1996 indicated desiccation and disc herniation of the lumbar spine with a moderate-sized posterior disc. He opined: "It is my orthopedic opinion that [appellant's] current level of symptomatology relates to his 1974 accident. Although he has had intermittent exacerbations and remissions over the years, his level of symptomatology has remained constant."

In a decision dated February 23, 1998, the Office found that the December 16, 1997 report of Dr. Ennis was insufficient to establish appellant's claim of recurrence.

Appellant requested an oral hearing before an Office hearing representative. He submitted a March 17, 1998 report to the Office from Dr. Ennis, who stated as follows:

“[Appellant] showed me a copy of your February 23, 1998 letter. It appears that there is some confusion regarding his disability status due to, according to your letter, inability to establish causal relationship.

“Although you are correct in your comment that [appellant] has had several intervening accidents between 1974 and the present time, there is no question that in his injury of 1974 he suffered a permanent impairment to his spine as a result of that accident.

“The last paragraph of Dr. Dennis' letter indicates that it was his orthopedic opinion at that time that [appellant] has sustained a permanent residual impairment to the body as a whole of 25 percent as a result of his work-related injury of 1974.

“While it is true that he may have suffered additional injuries to his back since then there is no question that at least a portion of his current impairment and symptomatology are due to that 1974 accident on a direct causal basis.

“Over the years [appellant] has sustained some additional degenerative changes to his spine, the result of degenerative arthritis which may be expected due to his aging and due to the original spine injury. The additional injuries to his back, the result of motor vehicle accidents, have also contributed in part to his symptoms.

“It is difficult for me to ascertain at this point the exact percentage that the original spinal injury is responsible for his current symptoms although in reviewing his records it appears clear that at least ¼ to ½ of his current complaints precedes any other injuries which he has had over the years.”

On September 10, 1998 Dr. Ennis reported that appellant continued to have pain in the lower lumbar region, the result of residual impairment following a work-related accident in 1974.

On December 3, 1998 Dr. Ennis advised that when appellant was discharged from care on October 29, 1996 following a motor vehicle accident, it was his orthopedic opinion that the motor vehicle accident had caused some additional permanent residual impairment to appellant's lumbar spine of five percent over and above his preexisting workers' compensation injury. Dr. Ennis reported that appellant had not returned for follow up regarding the motor vehicle accident, though he continued to be seen from time to time regarding his workers' compensation lumbar spine injuries.

In a decision dated December 15, 1998, the Office hearing representative found that the reports of Dr. Ennis were consistent in indicating that appellant's ongoing medical condition was

due to the employment injury of 1974. Noting that these reports were not contradicted by any substantial medical or factual evidence, the hearing representative remanded the case to the Office for a second opinion on whether the claimed recurrence of medical condition in October 1997 was causally related to the accepted 1974 work injury.

The Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. David B. Keyes, a Board-certified orthopedic surgeon. In a report dated May 17, 1999, Dr. Keyes related appellant's history and his findings on physical examination, which took place on May 12, 1999. He diagnosed the following: "Chronic low back pain probably related to degenerative changes (spondylosis) of the lumbosacral spine. Although the patient has a history of a herniated intervertebral dis[c] at L4-L5, there is no current objective evidence of a herniated dis[c] at present."¹

Responding to the question, "Do you feel that the claimed recurrence of 1997 was a result of the employment injury of 1974," Dr. Keyes answered as follows: "No." To the question, "If you do not feel that the occurrence of back pain in 1997 was related to the employment injury, to what do you attributed it to?" Dr. Keyes reported:

"This is a complicated case with several known injuries to the lumbosacral spine. Some injuries antedated the 1974 work injury and some injuries postdated the 1974 work injury. As such, it cannot be said with certainty as to which injury (including the work injury of 1974) was the major cause of the patient's current condition. I feel that these may have contributed to the patient's chronic low back pain with its degenerative condition. Much of this may have also been due to nonwork-related aging."

On the issue of restrictions, Dr. Keyes pointed out that appellant's restrictions "would be due to a chronic condition which is not necessarily work related."

The Office requested that Dr. Keyes clarify whether it was "more medically probable" that the clinical evidence showed that the incident of November 7, 1974 made appellant's underlying degenerative disc disease worse or whether it was more medically probable that the clinical evidence did not support that the lifting event made the underlying condition worse.

On May 28, 1999 Dr. Keyes responded:

"I reviewed your letter dated May 19, 1999. As I point out in answer No. 5, I think multiple conditions (including normal aging) have contributed to the degenerative condition of [appellant]. I think that it is not medically probable that the single incident in 1974 in which [appellant] lifted and threw heavy mail sacks caused or aggravated this degenerative condition. As noted above, I think this was an additive effect of multiple conditions, as well as normal wear and tear involved in the aging process. I trust that this explains my position."

¹ The record indicates that appellant refused to undergo an x-ray of the lumbar spine.

In a decision dated June 10, 1999, the Office denied appellant's claim for recurrence and denied continuing benefits. The Office found that the evidence did not support that appellant's current condition was related, by either cause or aggravation, to his work injury of November 7, 1974.

The Board finds that this case is not in posture for decision on whether appellant sustained a recurrence of his medical condition on or about October 5, 1997 that was causally related to the work injury of November 7, 1974.

A claimant seeking benefits under the Federal Employees' Compensation Act² has the burden of proof to establish the essential elements of his claim by the weight of the evidence,³ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁴

To support that his recurrence of medical condition on or about October 5, 1997 was causally related to his November 7, 1974 employment injury, appellant submitted the reports of his attending physician, Dr. Ennis, a Board-certified orthopedic surgeon. As the hearing representative found, Dr. Ennis consistently indicated that appellant's ongoing medical condition was due to the employment injury of 1974. The Office referral physician, Dr. Keyes, a Board-certified orthopedic surgeon, disagreed. He believed that the additive effect of multiple conditions, including the normal wear and tear involved in the aging process, contributed to appellant's degenerative condition, but he reported that the claimed recurrence of 1997 was not a result of the employment injury of 1974.

Neither medical opinion substantially outweighs the other. Dr. Ennis pointed to the constant level of appellant's symptomatology, diagnostic testing, the finding of permanent residual impairment and appellant's return to preaccident chronic pain status following his intervening motor vehicle accidents. He did not directly address, however, appellant's medical condition on or about October 5, 1997. Dr. Keyes directly addressed the matter but offered little if any medical reasoning. He did not explain the reason lifting and throwing heavy sacks of mail should be excluded from the multiple factors that he believed contributed to appellant's condition. Dr. Keyes' finding that there was no current objective evidence of a herniated disc at present is tempered by the fact that he obtained no x-ray.

Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁵

² 5 U.S.C. §§ 8101-8193.

³ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ 5 U.S.C. § 8123(a).

To resolve the conflict in opinion between appellant's physician, Dr. Ennis, and the Office referral physician, Dr. Keyes, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate referee medical specialist for a well-reasoned opinion on whether appellant's recurrence of medical condition on or about October 5, 1997 was causally related to his November 7, 1974 employment injury. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.

The Board further finds that the Office has not met its burden of proof to justify the termination of appellant's compensation benefits on the grounds that he no longer had residuals of the November 7, 1974 injury.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶

In this case, after obtaining a second opinion, the Office not only denied appellant's claim of recurrence but also denied continuing benefits on the grounds that the evidence did not support that his current condition was related, by either cause or aggravation, to his work injury of November 7, 1974. The Office therefore bears the burden to establish by the weight of the evidence that appellant's current condition is not related to his November 7, 1974 employment injury. The Office has not met that burden where there is an unresolved conflict on this issue between Dr. Ennis and Dr. Keyes. Due to this conflict of medical opinion, the Office did not meet its burden of proof.

The June 10, 1999 decision of the Office of Workers' Compensation Programs is set aside on the issue of recurrence of medical condition and is reversed on the issue of termination. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
August 2, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).